



Cirton, Shawn <shawn\_cirton@fws.gov>

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## FW: Elgin Community College (UNCLASSIFIED)

1 message

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**Machalek, Mike J LRC** <Mike.J.Machalek@usace.army.mil>  
To: "Chemich, Kathy G LRC" <Kathy.G.Chemich@usace.army.mil>  
Cc: "Shawn\_Cirton@fws.gov" <Shawn\_Cirton@fws.gov>

Wed, Feb 20, 2013 at 2:42 PM

Classification: UNCLASSIFIED  
Caveats: NONE

Kathy/Shawn...don't remember if I forwarded this to you...Dave is going to request mostly on-site work (If ECC allows/accepts it), or have them go 100% off-site.

-----Original Message-----

From: [Schulenberg.David@epamail.epa.gov](mailto:Schulenberg.David@epamail.epa.gov) [mailto:[Schulenberg.David@epamail.epa.gov](mailto:Schulenberg.David@epamail.epa.gov)]  
Sent: Wednesday, February 06, 2013 1:55 PM  
To: [Palermo.Mark@epamail.epa.gov](mailto:Palermo.Mark@epamail.epa.gov); Machalek, Mike J LRC  
Subject: Fw: Elgin Community College

Mark:

Here are some revisions to the 309(a) Order on Consent, based on my discussions with the Corps and USFWS. The revisions are to be cut-and-pasted" into Paragraph B4.

(See attached file: Revisions to I-R.docx)(See attached file: Ratio Table.pdf)

The amount of acres identified on-site encompasses both enhancement and creation, as previously discussed. Still don't know if ECC is going to consider this. Based on my discussion with the Corps, the acres on-site are not a 1:1 type of ratio. At best, the Corps seems to think they can credit ECC with 30 percent for each on-site acre restored (enhanced/created). This seems in line with the Corps ratio table, above, used to determine banking type credits. Again, we can discuss this further tomorrow.

The Corps provided an additional recommendation for off-site mitigation, located at a site in Harvard, Illinois. (See attached file: Mitigation Site-Harvard.jpg)  
We can discuss this site tomorrow. ECC may want to look at this site, if they are having trouble finding a bank.

David W. Schulenberg  
Senior Enforcement Officer  
U.S. EPA, Region 5  
Telephone: (312) 886-6680  
Fax 1: (312) 692-2973  
Fax 2: (312) 886-0168  
Email: [Schulenberg.David@epa.gov](mailto:Schulenberg.David@epa.gov)

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----- Forwarded by David Schulenberg/R5/USEPA/US on 02/06/2013 01:36 PM -----

From: David Schulenberg/R5/USEPA/US  
To: Mark Palermo/R5/USEPA/US@EPA,  
Cc: Wendy Melgin/R5/USEPA/US@EPA  
Date: 01/10/2013 08:26 AM  
Subject: Re: Elgin Community College

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Mark:(See attached file: Section 309(a) Order on Consent.docx)

Attached is a draft 309(a) Consent Order. As we have discussed with the Corps and with ECC, the Consent Order is based on our settlement discussion on the 28th (below).

It incorporates both on-site mitigation and off-site mitigation that we discussed during the meeting. Since ECC proposed rather significant on-site restoration, enhancement and creation (+/- 18.0) acs), I have included this in the proposed Consent Order. Second, I have revised our settlement demand downward for off-site mitigation, requiring 2.0 acres of wetland credits (v. 5 acres) to be purchased from a mitigation bank (Corps approved), which I think is appropriate given their settlement offer (which I think is an offer, anyway???)

With a stream buffer (+/- 1.15 acres) that ECC has proposed, this brings the total replacement to approximately 19.5 acres or a 3.75 :1 replacement v. a 5:1 replacement previously discussed.

I can live with that and I think the Corps will too.

Last, it also incorporated the Corps RP6 requirements allowing ATF permitting to leave fill in place (vis a vis NWP 32).

Shortly, I will be drafting a 309(g) CAFO to accompany this. It will proposed a penalty of about \$50,000 (we can leave that blank until we discuss with ECC). The language will be very similar to what you see in the attached document.

Give me a call...Dave

David W. Schulenberg  
Senior Enforcement Officer  
U.S. EPA, Region 5  
Telephone: (312) 886-6680  
Fax 1: (312) 692-2973  
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Inactive hide details for Mark Palermo---12/18/2012 07:26:28 AM---John and John: It was a pleasure meeting you on our November 28th meeting. As a follow-up to the

From: Mark Palermo/R5/USEPA/US  
To: "John F. Early" <jearly@ectrwm.com>, "John Regan" <jregan@elginlawyer.com>,  
Cc: David Schulenberg/R5/USEPA/US@EPA  
Date: 12/18/2012 07:26 AM  
Subject: Elgin Community College

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John and John:

It was a pleasure meeting you on our November 28th meeting. As a follow-up to the meeting, we request, to the extent available, an estimated cost for implementation of each of the wetland creation, restoration, and enhancement elements of the WBK proposal. We also ask what is the current cost of wetland mitigation bank credits, per acre, that would be eligible for mitigation for the ECC site. This information is necessary as part of our formulation of a settlement offer for this matter. Given the Holidays, we don't need this information until after New Year's. We understand it may take some

time to compile this information together given the Holidays and people being out, so if you can get us the information sometime in mid-January would be great.

Thank you and Happy Holidays!

Mark J. Palermo  
Associate Regional Counsel  
U.S. EPA Region 5  
(312) 886-6082

Classification: UNCLASSIFIED  
Caveats: NONE

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#### 5 attachments



**Mitigation Site-Harvard.jpg**  
211K

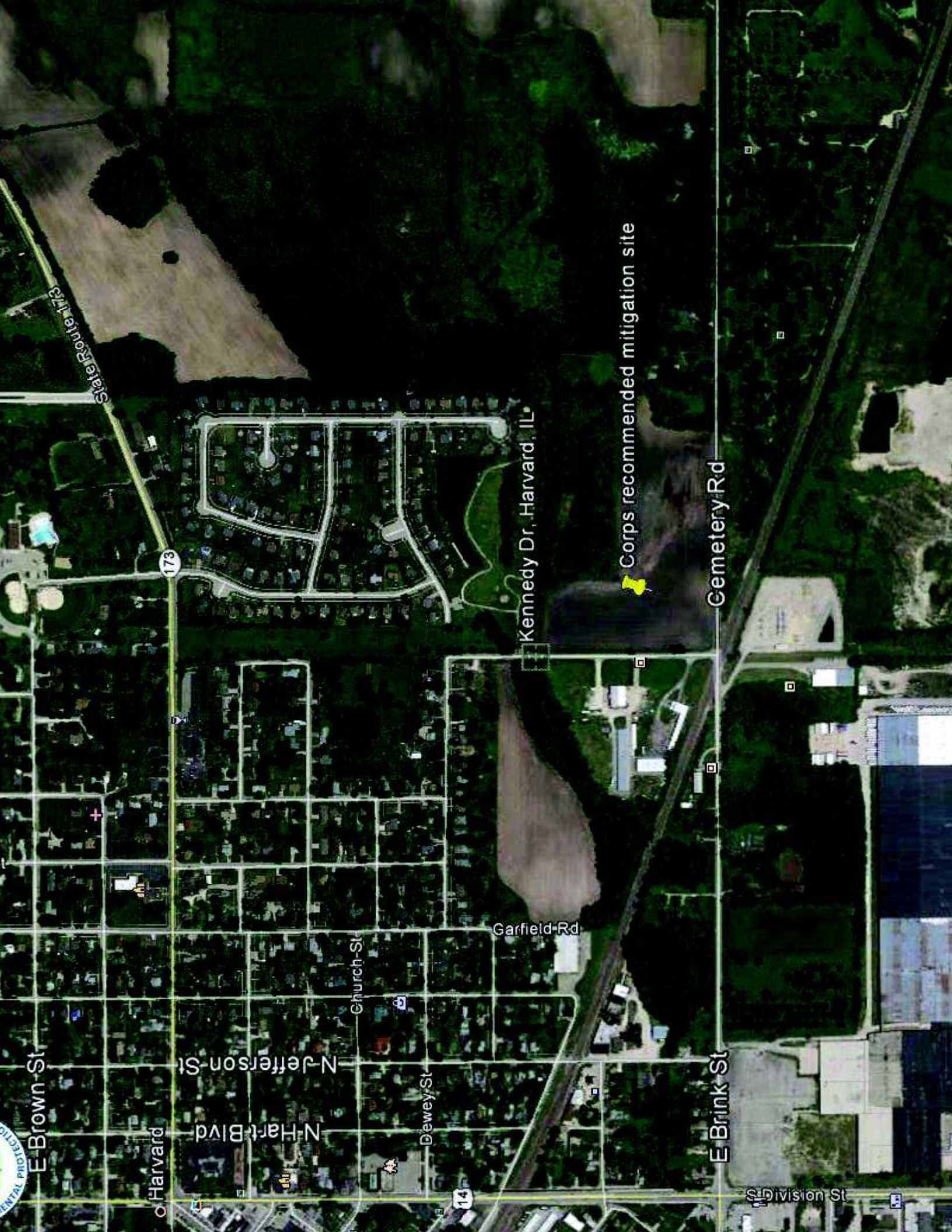
▼ **graycol.gif**  
1K

 **Revisions to I-R.docx**  
14K

 **Ratio Table.pdf**  
70K

 **Section 309(a) Order on Consent.docx**  
40K





E Brown St

Harvard

N Hart Blvd  
N Jefferson St

Church St

Dewey St

Kennedy Dr, Harvard, IL

Garfield Rd

E Brink St

Division St

Cemetery Rd

Corps recommended mitigation site

1. Within 90 days from the effective date of this Consent Order, Respondent agrees to obtain, consistent with the requirements of Paragraph B(3), above, authorization from the Corps for the dredged and fill materials to remain in place, provided that replacement of the wetland impacts occurs in the following manner:

(A) A plan to restore the environmental benefits (functions and values) to approximately 17.87 acres of wetlands through creation, restoration and/or enhancement, including:

(i) Onsite wetland creation (5.52 acres), wetland enhancement (9.97 acres) and buffer establishment (2.38 acres) as shown in the plans entitled, "Elgin Community College: Potential Wetland Creation and Enhancement Plan" (11-25-12);

(ii) A monitoring and maintenance plan for the onsite wetland creation and enhancement, above, necessary to control and manage invasive species.

(iii) A detailed implementation schedule identifying specific activity dates and milestones for initiating and completing all creation, restoration and/or enhancement, monitoring and protection activities, including but not limited bidding dates, contract award dates, notices to proceed with construction initiation and planting, dates for construction and planting completion, and scheduling of monitoring/inspection reports to the Corps.

(B) A plan to purchase no less than an additional 5.3 acres of wetland mitigation credits at a Corps approved mitigation bank.

**OR**

**1. A plan to purchase no less than 25 acre credits at a Corps approved wetlands mitigation bank.**



integrity of the bank. The determination of the credit to be granted upland areas must be based on clearly demonstrated functions, and not on general ecological values. In general, the credit ratio for the inclusion of upland areas will be 25%, but may be adjusted as deemed appropriate by the interagency review team during the evaluation of the bank prospectus. Upland areas must be afforded the same protection as the rest of the bank. No credit will be considered for upland areas that are not part of the bank site (for example, adjacent forest preserve land or other public lands). Since the goal of mitigation banking is to offset wetland losses, credits generated from inclusion of upland areas will comprise only a small percentage (less than 15%) of the total credits generated by the bank.

8. The inclusion of upland and deepwater environments within a compensatory wetland mitigation bank may be inadvertent (i.e., due to topographic reasons and real estate considerations) or planned (i.e., to realize or enhance certain wetland functions). In the latter case, upland areas may be either naturally occurring or be artificially created and, depending on their basic purpose, may occur along the periphery of the bank or be dispersed throughout.

9. If the inclusion of upland and deepwater areas is clearly inadvertent and has no demonstrable wetland enhancement/rehabilitation function, no mitigation credit would be accorded such areas. However, if beneficial effects can be clearly demonstrated, such environments would be accorded credit for mitigation purposes which is proportional to their functional contribution.

10. In summary, see the table below:

Type of Mitigation Credit	Range of Credit Rate per Acre Allowed for Mitigation Type	Percent of Total Credits Allowed for Mitigation Type
Preservation	10-15%	15%
Establishment (creation)	100%	No maximum
Re-establishment	100%	No maximum
Rehabilitation	10-50%	30% together with Enhancement
Enhancement	10-50%	30% together with Rehabilitation
Upland Buffer	10-25%	15%
Other Upland features	10-25%	15%

## SECTION 11 - CREDIT CERTIFICATION

1. Some uncertified credits will be available for use upon approval of the bank instrument, per the terms of this ICA. Uncertified credits may also be released by the District (in consultation with the IRT) once the banker has demonstrated that the hydrology and interim vegetation

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

IN THE MATTER OF )

Elgin Community College District 509 )  
Elgin, Kane County, Illinois )  
Respondent )

DOCKET NO. V-404-AO-13-

PROCEEDINGS UNDER SECTION 309(a) )  
OF THE CLEAN WATER ACT )  
33 U.S.C. § 1319(a) )

FINDINGS OF VIOLATION )  
AND )  
COMPLIANCE ORDER )  
on CONSENT )

The following **FINDINGS** are made and **CONSENT ORDER** issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by Section 309(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(a). The Administrator has delegated this authority to the Regional Administrator of U.S. EPA, Region 5, who has duly redelegated this authority to the undersigned Director, Water Division, EPA, Region 5, who hereby issues this Findings and Order.

**A. FINDINGS**

1. The Respondent in this matter is:

Elgin Community College, District No. 509  
1700 Spartan Drive  
Elgin, Kane County, Illinois 60123

2. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, U.S. Army Corps of Engineers ("Corps"), to issue permits for the discharge of dredged or fill material into navigable waters.

3. Section 301 of the CWA, 33 U.S.C. § 1311, prohibits the discharge of pollutants into navigable waters except in compliance with, inter alia, a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344.

4. The term "discharge of pollutants" is defined as "any addition of any pollutant to navigable waters from any point source...." 33 U.S.C. § 1362(12).

5. A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

6. A "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

7. "Wetlands" are defined as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 40 C.F.R. § 232.2(f).

8. Respondent owns and controls the property situated in located in Section 21, Township 41 N, Range 8 E, in the City of Elgin, Kane County, Illinois (the "Site") (Attachment1).

9. Between June 2009 and continuing through March 2012, Respondent, using backhoes, excavators, bulldozers and other earth moving equipment other excavation equipment dredged and filled approximately 5.0 acres of wetlands abutting wetlands of Otter Creek, a tributary to the Fox River, which is a navigable water of the United States, under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, respectively, 33 U.S.C. § 1344(a) and 33 U.S.C § 403, (Attachment 2).

10. Prior to initiating work in June 2009, as identified in Paragraph 9, above, Respondent completed the following activities on the site:

(a) In July 1991, Respondent submitted a Section 404 CWA permit application to the Corps. The permit application included a wetland delineation identifying "jurisdictional" wetlands located on the site adjacent to Otter Creek.

(b) In 1994, Kane County completed an assessment and a advanced identification of Wetlands and rated the wetlands on the site (approximately 91 acres), as wetland with high functional values for stabilizing vegetation, retainingg sediments, removing nutrients, and providing stormwater retention.

(c) In July 2002, Respondent submitted a Section 404 CWA permit application to the Corps including a wetland assessment delineating five wetland areas and four waters of the United States on the site.

(d) In August 2005, Respondents submitted a Section 404 CWA permit application to



the Corps. The application included a wetland delineation which in part, re-affirmed the wetland assessment identified in Paragraph 10 (c), above.

11. On June 7, 2012, the Corps, issued a "cease and desist" (C & D) letter to Respondents alleging that dredged and fill materials were discharged into wetlands, identified in Paragraph 9, above, in violation of Sections 404 and 301 of the CWA, 33 U.S.C. §§1344 and 311, respectively. The violations alleged by the Corps were undertaken during construction of a new stormwater detention pond and expansion of a student parking lot.

12. On August 15, 2012, in consultation with the Corps, EPA, pursuant to Section 308(a) of the CWA, 33 U.S.C. § 1318(a), issued an formal information request to Respondent seeking to clarify the nature, extent and circumstances surrounding the alleged violation, cited by the Corps in Paragraph 11, above.

13. On October 10, 2012, the Corps and EPA visited the site concluding the site and the wetlands are physically abutting Otter Creek, and are hydraulically connected to the Fox River, a navigable-in-fact water of the United States, under Section 10 of the Rivers and Harbors Act (RHA), 33 U.S.C. § 403.

14. At all times relevant to the activities in Paragraph 9, above, Respondents did not and presently do not have a Section 404 CWA permit, authorizing the discharge of dredged and fill materials into wetlands abutting Otter Creek.

15. The wetlands and other waters of the United States identified in Paragraph 9, above are bordering, contiguous or neighboring Otter Creek, which is tributary to the Fox River, an interstate and navigable waters of the United States.

16. The wetlands filled and/or disturbed by the filling activity referenced in Paragraph 9, above, are "waters of the United States" as defined at 40 C.F.R. § 232.2(q) and "navigable waters", as defined at Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

17. Respondent did not have and presently does not have a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, for the discharge of pollutants referenced in Paragraphs 9, above, into wetlands and other waters of the United States.

18. The Respondent is a "person(s)" within the meaning of the definition set forth in Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

19. The machinery referenced in Paragraphs 9, above, constitutes a "point source" within the meaning of the definition set forth in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

20. The discharged dredged materials referenced in Paragraph 9, above, constitutes "pollutants" within the meaning of the definitions set forth in Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

21. The placement of the material in the wetlands referenced in Paragraph 9, above, constitutes a "discharge of pollutants" within the meaning of the definition set forth in Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

22. Each discharge by Respondent of pollutants into navigable waters without the required permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.

23. Each day the discharged material remains in the wetland without the required permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.

## **B. CONSENT ORDER**

**BASED UPON THE FOREGOING FINDINGS**, and pursuant to the authority under Section 309(a)(3) of the CWA, 33 U.S.C. § 309(a)(3), vested in the Administrator, EPA, delegated to the Regional Administrator, and duly redelegated to the undersigned, **IT IS HEREBY ORDERED AND AGREED BY RESPONDENT AND EPA:**

1. Respondents immediately cease further discharges of fill material into the wetlands on the site, except in compliance with a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and the CWA, 33 U.S.C. § 1251, et seq.

2. Respondent has provided satisfactory and responsive answers to EPA's Section 308 information request, identified in Paragraph 12, above.

3. A Section 404 CWA permit may be issued by the Corps, pursuant to Section 404 (e) of the CWA, 33 U.S.C. § 1344(a) and 33 CFR § 323 (e)(2). Specifically, under Regional permit No. 6 (Attachment 4), the Corps may authorize any structure, work or discharge of dredged or fill material, remaining in place, or undertaken for mitigation, restoration or environmental benefit in compliance with "the terms of a final written non-judicial settlement agreement resolving a violation of Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act, or the terms of an EPA 309(a) order or consent decrees resolving a violation of Section 404 of the Clean Water Act."

4. Within 90 days from the effective date of this Consent Order, Respondent agrees to obtain, consistent with the requirements of Paragraph B(3), above, authorization from the Corps for the dredged and fill materials to remain in place, provided that a minimum of 5:1 replacement of the wetland impacts occurs in the following manner:

- (a) A plan to restore the environmental benefits (functions and values) to no less than 19.0 acres] of on-site wetlands (Attachment 4) through restoration, enhancement, monitoring and permanent protection/management.
- (b) A detailed implementation schedule identifying specific activity dates and milestones for initiating and completing all restoration, enhancement, monitoring and protection activities, including but not limited bidding dates, contract award dates, notices to proceed with construction initiation and planting, dates for construction and planting completion, and scheduling of monitoring/inspection reports to the Corps.
- (c) A plan and proposal to purchase no less than 2.0 acres of additional wetland mitigation credits and a Corps approved mitigation bank.

5. All submittals under Paragraph B (4) (a)(b) and (c), above, shall be provided to:

Leesa Beal, Chief  
Regulatory Branch  
U.S. Army Corps of Engineers  
Chicago District  
111 North Canal Street  
Chicago, Illinois 60606-7206

Keith Wozniak/Michael Machaelek  
Regulatory Branch  
U.S. Army Corps of Engineers  
Chicago District  
111 North Canal Street  
Chicago, Illinois 60606-7206

David Schulenberg  
Senior Enforcement Officer  
U.S. EPA, Region 5  
Water Division (WW-16J)  
77 W. Jackson Boulevard  
Chicago, Illinois 60604-3590

6. Respondent admits that the Administrator of EPA has jurisdiction of this proceeding pursuant to Sections 301 and 309 of the Act, 33 U.S.C. §§ 1311 and 1319.

7. Respondent neither admit nor deny the specific factual allegations and legal conclusions, identified in Paragraphs A(1) – A(12), above.

8. Respondent waives any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which the Respondent may have with respect to any issue of fact or law set forth in this Order on Consent, including, but not limited to, any right of

judicial review of the Section 309(a)(3) Compliance Order on Consent under the Administrative Procedure Act, 5 U.S.C. §§ 701-708.

9. U.S. EPA has the authority to use the information requested herein in an administrative, civil, or criminal action.

10. Neither the issuance of this Order by the U.S. EPA nor compliance with its terms affects Respondents' ongoing obligation to comply with the CWA or any other Federal, state or local law or regulation, nor does it preclude further enforcement action pursuant to 33 U.S.C. § 1319 for the violations cited herein.

11. Neither the issuance of this Consent Order by the U.S. EPA, nor compliance with this Consent Order by the Respondent shall be deemed to relieve the Respondent of liability for any penalty, remedy or sanction authorized to be imposed pursuant to Section 309(b), (c), or (g) of the CWA, 33 U.S.C. § 1319(b),(c) or (g), for any violation of applicable requirements of the CWA. U.S. EPA specifically reserves the right to seek any or all remedies authorized under these provisions for each and every violation specified in this Consent Order.

10. Violation of the terms of this Consent Order may result in the U.S. EPA taking further enforcement action under Section 309 of the CWA. The CWA includes provisions for administrative penalties, for civil injunctive relief and penalties, and for criminal sanctions for violations of the CWA. Specifically, U.S. EPA may assess civil administrative penalties of twenty-seven thousand five hundred dollars (\$27,500) per day of violation, up to a maximum of one hundred fifty-seven five hundred dollars (\$157,500) under 33 U.S.C. § 1319(g), or seek civil judicial penalties of \$27,500 per day of violation and civil injunctive relief for violations of the CWA under 33 U.S.C. § 1319(b).

11. Furthermore, U.S. EPA may seek criminal sanctions, including fines and imprisonment, for negligent or knowing violations of the CWA under 33 U.S.C. § 1319(c).

12. This Order becomes effective 10 days from the date it is executed and signed by the authorized representative of EPA.



In the Matter of:  
Elgin Community College  
Docket No. V-404-AOC-13-

Dated:

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**Dr. David Sam, Ph.D.**  
**President, Elgin Community College**

Dated:

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Tinka G. Hyde  
Director, Water Division  
U.S. Environmental Protection  
Agency, Region 5